Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

REGENCY OUTDOOR ADVERTISING, INC.,
a California corporation,
Petitioner,

vs.

CITY OF LOS ANGELES,
a municipal corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of Los Angeles (the "City") severely restricts the placement of wall-sized signs on the sides of multi-story buildings. A five-member Cultural Affairs Commission ("Cultural Affairs"), however, has the power to exempt certain wall signs from these restrictions by classifying them as "murals." Apart from a general statement of purpose governing all outdoor signs, the City has no guidelines in place to direct Cultural Affairs members in deciding which wall signs to exempt. Erecting a wall-sized sign without a mural exemption subjects the speaker to criminal and civil sanctions. The questions presented are:

1. Whether the City's Sign Ordinance severely restricting wall-sized signs is content-based, and must be stricken in its entirety absent a demonstration that it can withstand strict scrutiny, where it confers upon Cultural Affairs the right to grant exemptions from its restrictions following a review of a sign's message, its author, the author's past work, and the sign's sponsor.

2. Whether the City's Sign Ordinance confers unbridled discretion on Cultural Affairs, and thereby violates the First Amendment, by failing to provide specific, content-neutral guidelines for granting or denying applications for mural exemptions.

PARTIES TO THE PROCEEDING AND DISCLOSURE UNDER RULE 29.6

The following entities are parties to the proceeding in the court below:

Petitioner Regency Outdoor Advertising, Inc. is a privately held California corporation which has no parent corporations. The shares of Regency Outdoor Advertising, Inc. are not publicly traded, and no publicly held corporation owns 10% or more of its shares.

Virtual Media, Inc. is a California corporation that was a co-plaintiff below. Virtual Media, Inc. is not a petitioner here. The shares of Virtual Media, Inc., which has no parent corporations, are not publicly traded, and no publicly held corporation owns 10% or more of its shares.

The only other party to this action is Respondent City of Los Angeles California, a municipal corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Regency Outdoor Advertising, Inc. ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was not officially published, but is reprinted as Appendix A hereto. The order of the District Court from which Petitioner appealed to the United States Court of Appeals for the Ninth Circuit was not published, and is reprinted as Appendix C hereto.

JURISDICTION

Judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 14, 2002.[1] No petition for rehearing was filed. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

In the proceedings below, the jurisdiction of the District Court was properly invoked on the basis of the existence of a federal question and deprivation of civil rights pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). This action arose under the Constitution of the United States, the Federal Civil Rights Act, 42 U.S.C. § § 1983 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

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[1] The Judgment of the Ninth Circuit was filed by the District Court on March 13, 2002, and entered on March 14, 2002; the District Court's notice thereof is reprinted as Appendix B hereto.

Petitioner on June 29, 2001 filed a timely Notice of Appeal. 28 U.S.C. § 2107(a) and Fed.R.App.P. 4(a)(1)(A). The United States Court of Appeals for the Ninth Circuit properly exercised jurisdiction of the appeal under 28 U.S.C. § 1292(a)(1), which provides that the courts of appeals shall have jurisdiction of appeals from "interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that:

> Congress shall make no law ... abridging the freedom of speech, ...or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

The provisions of the Los Angeles Municipal Code applicable here are reprinted as Appendix D hereto.

STATEMENT OF THE CASE

A. The City's Restrictions on Wall-Sized Signs

Petitioner Regency Outdoor Advertising, Inc. ("Petitioner"), an outdoor advertising company, is one of two plaintiffs below that sought to enjoin Respondent City of Los Angeles (the "City") from enforcing the provisions of its Municipal Code prohibiting large, wall-sized displays that are painted upon, or affixed by a cabling system to, the sides of multi-story buildings (the "Sign Ordinance").

Off-premise signs or billboards, which carry messages unrelated to the site on which they are located or the activities conducted thereon, cannot be placed within the City of Los Angeles unless the speaker first obtains a permit. Due to their prominence in the City's skyline, displays on the sides of multi-story buildings are highly desirable. The City's Sign Ordinance severely restricts – effectively prohibiting – all off-premises wall-sized signs unless an exemption applies.

Wall signs are defined in § 91.6203 of the Sign Ordinance as follows:[2]

> **Wall Sign.** Any sign attached to, painted on or erected against the wall of a building or structure, with the exposed face of the sign in a plane approximately parallel to the plane of the wall.

Section 91.6203 also provides the definition for a "mural sign." (App. at D 3.) The only physical distinction

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[2] The relevant portions of § 91.6203 are reprinted in Appendix D hereto.

between a "mural sign" and a "wall sign" is the suspect and ambiguous requirement that a mural sign contain less than three percent "written material." (App. at D 4.) Otherwise, a "mural sign" is nothing more than a wall sign that has been approved by the five-member Cultural Affairs Commission ("Cultural Affairs"):

> **Mural Sign.** A sign which is applied to and made integral with a wall, the written message of which does not exceed three percent of the total area of the signs, and which *has been approved* pursuant to Section 91.6216 of this code (emphasis added).

Section 91.6216 confers on Cultural Affairs the authority and power to exempt certain wall signs from the prohibitions and restrictions placed on off-premises signs generally and wall signs in particular by classifying the sign as a "mural." (App. at D 6.) Where Cultural Affairs confers the status of a "mural" on a wall sign, the sign is benefited by an exemption from virtually all restrictions otherwise applicable, and the speaker is free to convey the proposed message without the restraints imposed on other off-site signage and other wall signs.

Section 91.6216(b) implements this exemption by providing that "mural signs shall not be required to comply with the provisions of § 91.6209 and 91.6220 of this Division." (App. at D 6.) Virtually all of the most severe restrictions on wall signs and off-site signs are contained within these two sections of the Sign Ordinance. They restrict the size, location, manner of construction, spacing, and height of signs, and in addition limit them to certain zones of the City. These restrictions effectively eliminate large wall-sized signs. Thus, when Cultural Affairs decides

to grant mural status to a wall sign, a person previously restrained from speaking is suddenly allowed to speak.

As to procedural mechanics, a wall sign may be considered for classification by Cultural Affairs as a "mural" upon application by the speaker. The application form requires the applicant to describe the content of the message that will be displayed.[3] The application also requires that the would-be speaker identify the person designing the sign, as well as that person's prior work. The application further requires that the speaker identify who is sponsoring the sign. Cultural Affairs as a result decides whether to grant mural status to signs, and in the process to exempt them from the severe restrictions of the Sign Ordinance otherwise applicable to wall-sized messages, after assessing (i) the content of signs, (ii) the identity and past works of the artist creating them, and (iii) the identity of the person(s) paying for the speech.

No set of written guidelines governs the exemption deliberations of Cultural Affairs. The City points to the general statement of purpose contained in the Sign Ordinance (the "Statement of Purpose") as the set of guidelines governing mural exemption deliberations. L.A.M.C. § 91.6201. In actuality, murals are not required to further the Statement of Purpose, but under § 91.6216(a) need only avoid conflict with its goals. (App. D.)

A statement of purpose, of course, has significant First Amendment implications, for through it a legislative body articulates the specific interests to be furthered by its regulatory scheme burdening speech. The Statement of Purpose identified by the City here, however, is not aimed at confining the discretion of Cultural Affairs in particular,

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[3] The relevant portion of the Cultural Affairs application form referred to herein is reprinted as Appendix E hereto.

but at the regulation of outdoor signs in general. The Statement of Purpose reads as follows:

> **Purpose**. The purpose of this division is to promote public safety and welfare by regulating signs in keeping with the following objectives:
>
> 1. That the design, construction, installation, repair and maintenance of signs will not interfere with traffic, safety or otherwise endanger public safety;
>
> 2. That the regulations will provide reasonable protection to the visual environment while providing adequate conditions for meeting sign users' needs;
>
> 3. That incompatibility between signs and their surroundings will be reduced;
>
> 4. That both the public and sign users will benefit from signs having improved legibility, readability and visibility;
>
> 5. That consideration will be given to equalizing the opportunity for messages to be displayed;
>
> 6. That adequacy of message opportunity will be available to sign users without dominating the visual appearance of the area.

L.A.M.C. § 91.6201 [App. at D 1].

In fact, there is no separate set of written guidelines or goals to restrict the discretion of Cultural Affairs when it exercises its awesome gatekeeping power in controlling

what wall-sized messages may be displayed on the buildings constituting the City's skyline.

B. The City's Threats of Prosecution

After Petitioner leased a number of locations on which to place wall signs, it then erected a number of wall-sized signs without seeking a permit or mural exemption beforehand.[4] In response, the City issued citations demanding removal of the signs and threatened a number of Petitioner's lessors (the property owners leasing the locations to Petitioner for the placement of its wall signs) with criminal prosecution.

In the face of the City's enforcement actions, several of Petitioner's wall signs were removed pending the outcome of Petitioner's challenge to the Sign Ordinance. The manner in which a wall/mural sign is temporarily removed depends on whether it is painted on the building or consists of a vinyl covering stretched across the wall by a cabling system. Where the sign is painted, Petitioner has simply covered the wall with a new coat of paint, thereby obliterating the message. Where the sign consists of a vinyl covering, the vinyl has been temporarily unfastened and rolled up.

In other instances, property owners from whom Petitioner has leased sites for wall/mural signs had not

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[4] Where, as here, a law unconstitutionally imposes on a speaker the prior restraint of a permit, the speaker is not required to submit to the permitting requirement as a prerequisite to engaging in the protected conduct. Thus, a speaker may erect a sign or billboard without applying for a permit where the permitting requirement is implemented as part of a regulatory scheme that violates the First Amendment. *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938, 22 L. Ed. 2d 162 (1969); *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996), *cert. denied*, 522 U.S. 912 (1997).

received citations at the time Petitioner filed its Motion for Preliminary Injunction (the "Motion") or, after receiving citations and/or threats of prosecution, indicated a willingness to allow Petitioner to challenge the constitutionality of the City's ordinance.

C. Procedural History

Petitioner's First Amended Complaint below (the "Complaint") asserts a facial and as-applied challenge to the Sign Ordinance under the First Amendment to the extent the Sign Ordinance restricts large, wall-sized displays. The Complaint states claims for declaratory and injunctive relief, discriminatory enforcement, and damages for deprivation of civil rights.

On February 8, 2001, Petitioner[5] filed its Motion seeking to restrain the City from enforcing the Sign Ordinance against approximately 28 of Petitioner's wall sign locations. The District Court issued its order denying Petitioners' Motion on May 30, 2001. (App. C.) The District Court based its denial of the Motion solely on its determination that Petitioner "lack[s] standing to challenge the constitutionality of the CAC [the Cultural Affairs Commission]." (App. at C 26.)

On June 29, 2001, Petitioner filed its Notice of Appeal. On February 14, 2002, the United States Court of Appeals for the Ninth Circuit issued its decision affirming the ruling of the District Court. (App. A.) While the Court of Appeals reversed on the issue of standing, finding that Petitioner did in fact have standing to challenge the Sign Ordinance, it affirmed on an alternative ground, finding that the standards for the issuance of a preliminary injunction had not been met. (App. at A 4.) The Court

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[5] As noted above, the plaintiffs below consisted of Petitioner and Virtual Media, Inc., which is not a petitioner here.

ruled that Petitioner had failed to make a showing that the Sign Ordinance is content-based, and had similarly failed to establish that Cultural Affairs, in deciding whether to grant exemptions, exercised unfettered discretion. (App. at A 4.)

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *METRO-MEDIA, INC. v. CITY OF SAN DIEGO*

In the proceedings below, Petitioner sought a declaration that the Sign Ordinance is unconstitutional on its face because it restricts speech on the basis of its content, and because the City had failed to prove that its regulatory scheme can withstand strict scrutiny. It is fundamental under *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), that a sign ordinance cannot be viewed as content-neutral where it grants exemptions to specified categories of signs based on the content of their messages.

Here, the City's Sign Ordinance severely restricts, and virtually bans, wall-sized signs, but affords an exemption to certain signs, denominated "mural signs." Under the terms of the Sign Ordinance, "mural signs" are those signs "made integral with a wall," containing a "written message" ... "which does not exceed three percent of the total area of the sign," *and which **have been approved as "murals" by the five-member Cultural Affairs Commission.*** In other words, a wall sign becomes a "mural," and correspondingly becomes exempt from the prohibitions and restrictions of the Sign Ordinance[6]

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[6] As noted above, pursuant to § 91.6217.2 of the Sign Ordinance, once Cultural Affairs determines a display can be posted as a "mural," it

applicable to other wall signs and off-premises signs, merely upon its approval by Cultural Affairs as a "mural."

A regulatory scheme under which wall signs are effectively banned unless they receive in advance the approval of Cultural Affairs, a committee that does not reach its determination to approve or disapprove a sign until it has examined the sign's content, authorship and sponsorship, must be found unconstitutional unless the City carries its burden of demonstrating that its regulatory scheme can withstand strict scrutiny.

Rather than demonstrate that the restrictions of its Sign Ordinance further any compelling governmental interest, or show that it has carefully assessed the First Amendment implications of allowing a small committee to choose the messages that will be most prominently displayed on the City's skyline, the City has touted the *results* of its censorship. In its Answering Brief before the Court of Appeals, the City noted that Los Angeles "has often been called the 'Mural Capital of the World,'" and that "murals are an integral part of the cultural expression of the City and have become a permanent part of the City's cultural identity." However desirable such a cityscape might be in the view of the City, the "cultural expression" created through an array of murals does nothing to advance values of freedom of expression under the First Amendment. First Amendment concerns are acutely implicated where the government seeks to license speech for the purpose of creating a visual landscape that is, *in its view*, a laudable reflection of a municipality's "cultural affairs." And these concerns are particularly acute where the government creates this rendition by choosing among speakers and messages.

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becomes exempt from the restrictions otherwise applicable to all off-premises signs imposed under §§ 91.6210 and 91.6218.

Thus, the City here has ignored the degree to which its sign restrictions are antithetical to First Amendment values. At bottom, the City is choosing the content, authorship, sponsorship and viewpoints that make up the messages delineating its skyline, and doing so through the vehicle of a five-person committee that determines who may speak, and who is to be silenced. Whatever cultural values are embraced through such a process, those values are hardly consistent with the political culture of robust debate that has flourished under the protective cover of the First Amendment.[7]

This Court has left no doubt that the First Amendment applies to a regulatory scheme restricting billboards; accordingly, there is no question that a law banning or restricting the erection of wall signs and billboards burdens speech and is unconstitutional unless it passes the appropriate level of scrutiny under First Amendment analysis. *Metromedia*, 453 U.S. at 520 ("There can be no question that a prohibition on the erection of billboards infringes freedom of speech.").

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[7] Were the City to argue that its vision of a "cultural affairs" skyline is the governmental interest in aesthetics furthered by Sign Ordinance, it could not establish such a claim. There is in actuality no coherent vision of the City's cultural identity implemented through the murals approved by Cultural Affairs. Certain of the Commission's members have at times disfavored commercial advertisements, though nowhere does the Sign Ordinance provide that approval of a mural is to turn on whether its message conveys commercial or noncommercial speech. Certain commercial ad campaigns (notably the "Think Different" campaign mounted by Apple Computers) have been a popular mainstay of Los Angeles murals. Distinctly political speech has also made its way into murals, such as a large display welcoming the Democratic National Convention which took place in the summer of 2000 (this display not only promoted a political party, but in addition prominently featured the logo of certain corporate sponsors). Other murals have displayed cultural messages favored by Cultural Affairs.

Indeed, the Ninth Circuit itself long ago recognized that communicating through signs and posters is "virtually pure speech." *Baldwin v. Redwood City*, 540 F.2d 1360, 1366 (9th Cir. 1976), *cert. denied sub nom. Leipzig v. Baldwin*, 431 U.S. 913 (1977).

The City has argued that its mural exemption furthers the City's interest in aesthetics, stimulates tourism, and fosters and improves the City's cultural and civic identity, as well as the quality of urban life. The latter variations on the governmental interest in aesthetics may constitute *substantial* governmental interests, but they do not constitute *compelling* governmental interests of the sort necessary to withstand strict scrutiny. *North Olmstead Chamber of Commerce v. City of North Olmstead*, 86 F. Supp.2d 755, 767 (N.D. Ohio 2000) (while this Court "has determined that 'safety' and 'aesthetics' are 'substantial' interests [citing *Metromedia*], this Court has never determined that these interests are compelling enough to justify content-based restrictions on fully protected speech."). In the proceedings below, the City never identified a compelling governmental interest that might be furthered by its Sign Ordinance.

Because the application form utilized by Cultural Affairs requires the applicant for a mural exemption to describe the content of the proposed message, there can be no genuine dispute here that Cultural Affairs considers a sign's content before reaching its decision on whether to confer the status of a mural on the sign. But the application goes further, requiring the applicant to identify the "artist" who has designed the message, the artist's past work and the sponsor supporting the proposed sign. (App. E.) Petitioner's challenge to the Sign Ordinance thus raises the constitutional propriety of adopting an exemption based on consideration of the speaker's message, identity and sponsorship, not to mention the content of the message

itself (as well as the fact, addressed below, that the Sign Ordinance confers unbridled discretion on Cultural Affairs in exercising its powers).

In *Metromedia*, this Court determined that the presence of such content-based exemptions, regardless of the inherent constitutionality of the exemptions themselves, renders an ordinance a content-based regulation of speech. The Court considered several categories of exemptions in the challenged ordinance, all of which were triggered by the content of the message displayed. None of the exemptions went so far as the mural exemption of the Sign Ordinance, in that none conferred on a small group the power to bestow a blanket exemption from the heavy restrictions on speech imposed by San Diego's anti-billboard ordinance. Thus, in conferring on Cultural Affairs the ability to grant such exemptions, the City took the Sign Ordinance beyond the realm of a traditional time, place and manner regulation and rendered it, indisputably, a content-based regulation.

Despite Petitioner's delineation of the mural exemption, the Court of Appeals ruled that Petitioner failed to show that the Sign Ordinance is content-based. Similarly, the City contended that the Sign Ordinance may be judicially tested under a less stringent time, place and manner analysis. This Court, however, rejected such an argument in *Metromedia* due to the presence of exemptions in a sign ordinance:

> Finally, we reject appellees' suggestion that the ordinance may be appropriately characterized as a reasonable "time, place, and manner" restriction. The ordinance does not generally ban billboard advertising as an unacceptable "manner" of communicating information or ideas; rather,

> it permits various kinds of signs. Signs that are banned are banned everywhere and at all times. [¶] It is apparent as well that the ordinance distinguishes in several ways between permissible signs at a particular location by reference to their content. Whether or not these distinctions are themselves constitutional, they take the regulation out of the domain of time, place, and manner restrictions.

Metromedia, 453 U.S. at 516-517.

Thus, by challenging the Sign Ordinance, Petitioner satisfied whatever burden was incumbent upon it to demonstrate that the Sign Ordinance regulates speech on the basis of content. Contrary to the conclusion of the Court of Appeals, to prevent injunctive relief, the burden was on the City to demonstrate that its Sign Ordinance can pass muster under whatever level of First Amendment scrutiny is applicable. Once a speaker shows that a law imposes restrictions on the freedom of speech, the government bears the burden of establishing the law's constitutionality in all instances, not merely in those instances where the law is content-based. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

Where, however, restrictions on speech are content-based, the government's regulation of speech is presumptively invalid under the First Amendment. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). Nor does a speaker, to establish harm, need to show more than denial of the right to speak. Where, as here, a person is denied the right of speech, harm is presumed. *Elrod v.*

Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Absent a showing by the City that its Sign Ordinance can withstand strict scrutiny, the Sign Ordinance must be declared unconstitutional. Under circumstances where irreparable and immediate harm can be presumed, and the City fails to address the elements of a strict scrutiny analysis, there is room for but one conclusion: additional harm pending trial can be deterred only by the issuance of a preliminary injunction.

Moreover, the District Court had no latitude in its discretion to avoid ruling on the Sign Ordinance's constitutionality. Viewed from a procedural standpoint, once a law burdening speech was placed before the District Court by means of a facial attack, the District Court was required to address the issue of its constitutionality. And because the law was shown to constitute a content-based regulatory scheme burdening noncommercial as well as commercial speech, the District Court was required to strike it in its entirety unless the government carried its burden of demonstrating that the law can withstand strict scrutiny. As this Court observed in *Metromedia*:

> Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government's regulatory interests with the individual's right to expression. '[A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.'

Metromedia, 453 U.S. at 502 (quoting *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 91 (1977), which in turn quotes *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)).

Thus, when the Court of Appeals found that Petitioner did not meet the merits requirements for the issuance of a preliminary injunction because it "failed to produce evidence indicating that the Sign Ordinance's provision for 'mural signs' is content-based...," the Court reached a conclusion conflicting with this Court's decision in *Metromedia*.

However much the City might wish to have its skyline record a reflection of the City's "cultural affairs" as envisioned by a five-member Cultural Affairs Commission, an array of prominent messages chosen by the government deeply jeopardizes First Amendment values. As this Court observed in the context of a different medium of expression:

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. *Our political system and cultural life rest upon this ideal.* [Emphasis added; citations omitted.] Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.

Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 641 (1994).

A regulatory scheme that grants a body, such as Cultural Affairs, the power to choose who among applicants may be allowed to erect messages on the City's

skyline implements a landscape of government controlled speech and viewpoints, stifling in the process not only heresy and dissent, but even debate. "[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. [Citations omitted.] Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broadcasting,* 512 U.S. at 642. The decision of the Court of Appeals, which allowed the City to avoid the exacting scrutiny demanded by First Amendment principles, thus conflicts with *Metromedia* and other of this Court's decisions for the foregoing reasons.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING OBJECTIVE AND CERTAIN GUIDELINES WHERE THE GOVERNMENT IMPOSES A PRIOR RESTRAINT ON SPEECH

The Sign Ordinance imposes a prior restraint on speech in that the City bans signs, or alternatively requires a speaker to obtain a permit before they may be erected. Wall-sized signs for the sides of multi-story buildings – the signs and displays that the City now finds to be a reflection of its "cultural affairs" – are generally prohibited unless Cultural Affairs grants a mural exemption. Thus, the Sign Ordinance provides that a would-be speaker is barred from posting a wall-sized message in Los Angeles unless the speaker first obtains the consent of Cultural Affairs.

It is fundamental under such circumstances that without the safeguard of definite, certain and ascertainable criteria to govern the exercise of Cultural Affairs' discretion, the Sign Ordinance violates the First

Amendment. This Court has long held[8] that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) ("a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."); *City of Lakewood v. Plain Deale Publishing Co.*, 486 U.S. 750, 755-58 (1988). The right to be free from such prior restraints on expression is so fundamental to our system of constitutional limitations on the power of government that "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151.

Indeed, in *Metromedia*, Justice Brennan in his concurring opinion notes that "[a]ccording such wide discretion to city officials to control the free exercise of First Amendment rights is precisely what has consistently troubled this Court in a long line of cases starting with *Lovell v. Griffin*, 303 U.S. 444 (1938)." *Metromedia*, 453 U.S. at 537-38.

Notwithstanding the unfettered discretion granted to the members of Cultural Affairs, the Court of Appeals concluded, without analysis or discussion, that Petitioner had "failed to demonstrate that the Commission enjoys unfettered discretion to accept or reject signs." (App. at A 4.) The Court of Appeals reached this conclusion despite

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[8] *See, e.g., Saia v. New York*, 334 U.S. 558, 559-60 (1948); *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951); *Staub v. City of Baxley*, 355 U.S. 313, 325 (1958).

the fact that, after Petitioner pointed out the absence of any guidelines in the text of the Sign Ordinance, and included in the record minutes from Cultural Affairs' meetings over the last seven years showing that the Commission members themselves complained that there were no guidelines (discussed below), the only criteria identified by the City consisted of the provisions of the Statement of Purpose applicable generally to the City's regulation of all outdoor signs. In fact, the City was never able to identify any guidelines limiting or controlling Cultural Affairs' discretion to grant or deny applications for mural *exemptions* from the restrictions of the Sign Ordinance.

Under these circumstances, the Sign Ordinance lacks sufficiently definite and objective criteria to guide the exercise of the awesome power the City confers on Cultural Affairs – the power to choose who may speak and post messages on the sides of the City's buildings. The Court of Appeals reached a conclusion in conflict with this Court's decisions in *Shuttlesworth* and *Metromedia* when it failed to recognize that, whatever guidance the generally applicable Statement of Purpose may provide to limit the restrictions contained in the City's regulatory scheme as a whole, it cannot as a matter of logic at the same time apply to guide decisions to determine what signs should be *exempted* from the same regulatory controls.

The confusion and disparate treatment – and, inevitably, content- and viewpoint-based discrimination – that necessarily flows from such indefinite and uncertain guidelines is readily apparent in meeting minutes that memorialize Cultural Affairs' deliberations. Early on, in January 1995, Commission members voiced their confusion concerning the factors they should consider in determining whether a sign may be qualified as a mural. One Commissioner asked outright what factors can be reviewed, referencing "color" and "arrangement." Another

Commissioner curiously argued that the decision has "nothing to do with artistic value."

Five years later, in a July 2000 meeting, Commissioners were still raising concerns over what criteria should be applied. The Commission President complained that there were still no written guidelines for the Commission's use. Another Commission member argued in response that approval should not be withheld just "because guidelines had not yet been established...," but in the same discussion commented that the murals "celebrated the Democratic convention."

Even though the City has had nearly a decade to adopt sufficient guidelines, the decision-making members of Cultural Affairs have not yet developed or been provided with any definite or certain criteria to govern their discretion. In the absence of sufficiently objective criteria, it is impossible to know whether the exercise of the mural exemption power furthers any particular governmental interest, much less whether it furthers a compelling one. As a result, there is no objective standard for determining whether the exemption might further the interest of aesthetics. Nor is the Commission constrained by any guidelines that might further traffic safety. Indeed, it is hard to imagine how either the goal of aesthetics or traffic safety could be furthered by conferring on Cultural Affairs the power to grant *exemptions* from the City's otherwise applicable restrictions, thereby allowing Cultural Affairs to determine what messages should be *added* to the City's skyline. Undoubtedly for this reason, the Sign Ordinance merely provides that the exercise of the power to grant mural exemptions shall not be in conflict with the goals embraced in the Statement of Purpose.

Ostensibly to further the governmental interest of safety, one of the restraints on signs in Los Angeles is the

requirement that signs be reviewed by both the Department of Transportation and by the Department of Building and Safety. However, Cultural Affairs exercises the power to exempt a speaker from even these requirements. The application form submitted by Petitioner, in paragraphs 11 and 12, contains confirmation that Cultural Affairs is granted this broad discretion:

> 11. INPUT AND DOCUMENTATION, DEPARTMENT OF BUILDING AND SAFETY SIGN PRE-INSPECTION, if applicable (*as determined by Cultural Affairs Department* . . .) . . ..
>
> 12. INPUT AND DOCUMENTATION, DEPARTMENT OF TRANSPORTATION, if applicable (*as determined by Cultural Affairs Department Staff and/or Department of Building and Safety* . . .) [emphasis added].

(App. at E 2.)

Thus, Cultural Affairs is granted the power to exempt a speaker from clearance by the Department of Transportation and the Department of Building and Safety, yet nowhere are there any guidelines to determine which speakers or signs are to be exempted from such requirements, or any assessment as to why Cultural Affairs might be qualified to exercise such a power.

In the proceedings below, a lobbyist active in Los Angeles submitted a declaration stating that there were still no written guidelines at the time Petitioner filed its Motion. Thus, because they are unrestrained, Commission members have the leeway to favor certain wall-sized messages and disfavor others. The lack of guidelines has led to such results as the approval of a mural for Wells Fargo Bank

because otherwise the Bank refused to locate a branch in the economically disadvantaged neighborhood near where the wall sign was to be erected.

This Court has recognized that the discretion to approve or deny free speech rights raises significant dangers of content-based censorship. *See, e.g., City of Lakewood*, 486 U.S. at 759. The lack of guidelines other than the requirement that Cultural Affairs conclude that any proposed mural sign is not inconsistent with the broad and vague principles described in the Statement of Purpose obscures the favoring of particular messages and prevents any reviewing court from evaluating whether the decision to approve a particular sign is based on content-neutral factors or is simply a disguised method of censorship, or a vehicle for implementing the display of certain City-approved viewpoints. As stated by this Court in *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131 (1992):

> If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.

Assuming the City is correct in citing the Statement of Purpose as the only set of guidelines governing the exemption-granting discretion of Cultural Affairs, then Cultural Affairs is free to deny an applicant if it determines that a particular sign does not "promote safety and welfare." It is also free to deny a would-be speaker the right to post a message if it concludes that "both the public and sign users" will not "benefit from a sign's having improved legibility, readability and visibility."

Furthermore, Cultural Affairs must consider whether a sign will not detract from the goal of "equalizing the opportunity for messages to be displayed."

The latitude and ambiguity inherent in such vague standards allows Cultural Affairs to approve or deny a would-be speaker for any reason, or for no reason. For example, at its March 5, 1998 meeting, an outdoor display company sought permission to erect an advertisement for Apple Computer bearing a picture of opera diva Maria Callas. The Commission rejected the ad, calling it a "blight on the distinguished architectural assemblage and approach to downtown [Los Angeles]." Two years later, a nearly identical Apple Computer ad was approved for the wall of a nearby building. And on the same site where the ad for Apple Computers was denied in 1998, an ad for Gap Jeans was allowed only six months later.

To permit a governmental body to allow or disallow speech for the purpose of implementing the general notions of aesthetics and cultural values only after reviewing proposed messages is without doubt to place the government in a position of discriminating against speech on the basis of its content. It is also to sanction absurd and illogical results for which Cultural Affairs cannot be held accountable.

The foregoing examples amply demonstrated, certainly for purposes of requiring a rebuttal by the City, that the exemption-granting power conferred on Cultural Affairs is unconstrained by any objective criteria. The number and variety of factors considered; the vague and indefinite guidelines of the Statement of Purpose; the approval of a sign as a lure to commercial development; the promotion of a national political party holding its nominating convention in Los Angeles; all demonstrate conclusively that unfettered discretion is granted to

Cultural Affairs in the consideration of whether to allow speakers to post their messages. In *Shuttlesworth* and other cases in its line, this Court has recognized that the necessity to obtain approval from a governmental agency granted the sort of leeway enjoyed by Cultural Affairs here constitutes an intolerable restraint on the exercise of First Amendment freedoms. For this reason, the Court of Appeals reached a conclusion in conflict with the decisions of this Court.

CONCLUSION

In affirming the District Court on the alternative ground that Petitioner had failed to demonstrate that the merits test for an injunction was satisfied, even in light of the City's failure to offer any evidence or argument that the Sign Ordinance can withstand strict scrutiny, the United States Court of Appeals for the Ninth Circuit rendered a decision in conflict with the decisions of this Court. In the face of Petitioner's request for a preliminary injunction, which required the District Court to assess the constitutionality of the Sign Ordinance, the City failed to meet its burden under the First Amendment of demonstrating that its Sign Ordinance can withstand strict scrutiny, and for that reason alone the preliminary injunction should have issued. Petitioner placed before the courts below a regulatory scheme that confers upon a five-member citizens commission the power to choose among speakers.

In the area of First Amendment culture and values, it is this delegated power that must be policed most vigilantly, for under its auspices the government is unconstrained in advancing favored speakers and viewpoints. Without the clearest and most certain of limitations on its exercise, such a power renders a regulatory scheme pervasively antithetical to the First Amendment.

Accordingly, Petitioner respectfully submits that a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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